YEE THIAN FUTT & ORS v. LIEW SAN KIAN & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
STEPHEN CHUNG J
[SUIT NO: KCH-22NCVC-58-9-2014]
27 FEBRUARY 2018

TORT: *Negligence – Damages – Claim for – Explosion and fire caused damage to adjacent building – Whether explosion and fire due to defendants' negligence – Whether agrochemicals and fertilizers stored aggravated cause of fire – Whether defendants owed duty of case to plaintiffs – Whether defendants breached duty of care – Whether damage caused by explosions to neighbouring building foreseeable – Whether causation established*

The first plaintiff was the registered owner of a building situated at Lot 980. The first plaintiff used the first floor of the building as an office. The second plaintiff occupied the ground floor of the building to manufacture and supply ice cream. The third plaintiff was the son of the first plaintiff and a director of the second plaintiff. The third to fifth plaintiffs were employees of the second plaintiff who worked at the ice cream factory. The first to fifth defendants were partners, trading under the name of Kim Yi Trading Company, in the business of selling agrochemicals and fertilisers which occupied an adjacent building at Lot 981 which was also used to store the agrochemicals and fertilizers. The first to third defendants were the registered owners of Lot 981. On 14 March 2014 a fire and explosions occurred in Lot 981 which caused damage to Lot 980 belonging to the first plaintiff and to the business of the second plaintiff. The third, fourth and fifth plaintiffs who were working in Lot 980 sustained injuries as a result. The plaintiffs submitted that, as a result of the explosions, the building and factory became severely damaged which interrupted the second plaintiff's business causing loss of profit from the business for five months from the day of the explosions. The plaintiffs brought the present action against the defendants claiming damages in negligence and nuisance under the rule of *Rylands v. Fletcher* and claimed against the defendants jointly and severally for general damages and for special damages. The plaintiff had also pleaded on the maxim of *res ipsa loquitur*. It was alleged that a welding operation carried out in the defendants' premises had led to the fire and eventually the explosions. Newspapers' reports also confirmed that the fire and explosions were believed to be set off by acetylene gas used during wiring works in the premise and that the hazardous materials detected trace amounts of hydrogen sulfide gas prompting police to cordon the area. The defendants, on the contrary, submitted that the explosions were accidental due to the chemical reaction and or nature of the agriculture products and not due to the negligence of the defendants. In respect of damages, the defendants denied liability and contended that the second plaintiff operated the ice cream

A factory illegally because it did not have the relevant license, permit or approval of the relevant authorities to use the factory for the manufacturing and supply of ice cream and not entitled to the damages as claimed. During trial, the defendants amended their statement of defence by pleading that the third to fifth plaintiffs were insured and covered by Perkeso which had paid
B compensations to them for their injuries and, therefore, not entitled to claim the damages for their personal injuries again.

Held (allowing plaintiffs' claim in part):

(1) The plaintiffs and defendants were neighbours and in close proximity with each other. Any carelessness on the part of the defendants, as in this
C case in which fire and explosions occurred in Lot 981; it was foreseeable that the explosions would likely cause damage to the property and the business of the plaintiffs in the adjoining Lot 980 and injuries to persons in Lot 980. (para 13)

D **(2)** Based on the defendants' pleadings of the inevitable explosion due to the agrochemical nature of the products stored and on their witness statements that the explosion could occur due to the chemical reaction and or nature of the agriculture products stored in their premise, they knew or were aware of the risk of an explosion. The risk was
E foreseeable. The first and third defendants did not explain what steps or actions were taken to prevent the chemical reaction or nature of the agrochemicals and fertilisers stored or what steps were taken to manage or reduce the risk of explosion. (paras 22 & 23)

(3) Although the reporters were not called to testify, the court shall presume
F the genuineness of a newspaper report under s. 81 of Evidence Act 1950. The defendants did not seriously challenge the contents of the newspaper reports and did not adduce any evidence to the contrary or that the newspapers' reports were fabricated or false. (para 26)

(4) Welding carried out in the premise which was used to store
G agrochemicals and fertilisers of a volatile and inflammable nature, the defendants knew and had assumed the risk of a fire and an explosion in their premise. Again, they did not explain the steps taken to prevent or reduce the risk of the fire and explosion in the premise which was used to store the agrochemicals and fertilisers especially when welding was
H being carried out. In failing to do so, that tantamount to negligence on their part. (para 28)

(5) Based on the facts and circumstances of the case, on a balance of probabilities, the plaintiffs have proved negligence on the part of the defendants. The plaintiffs have also proved that the rule in *Rylands*
I *v. Flectcher* was applicable to the facts of this case. The plaintiffs have proved causation and that they had sustained losses and damages as a result. (para 31)

(6) There is no general rule of law that a plaintiff, acting contrary to law, when he suffered damage of which the defendant's negligence is alleged to be a cause, does not automatically preclude him from recovering damages from the defendant. There is no a *priori* reason why the illegality of a particular enterprise or activity should automatically negate the existence of a duty of care which might otherwise arise from the relationship which subsists between the parties. Therefore, the second plaintiff's failure to renew his business licence did not preclude the second plaintiff from recovering damages sustained due to the negligence of the defendants. (paras 41 & 42)

(7) The first and second plaintiffs, in the statement of claim, did not separately list their fixtures, machines, furniture or spare-parts owned by them which were damaged. Instead, they claimed total loss for fixtures, machineries and furniture in the factory in one lump sum of RM258,428.14. Based on the three quotations amounting to RM136,369 and the invoices and submissions made on the value of the items claimed by the second plaintiff which amounted to RM73,035.51, these two sums aggregated to RM209,404.51 only. Therefore, the claim for RM258,428.14 could not be correct. (para 44)

(8) Based on the title conditions, Lot 980 could not be used for residential purpose. The items referred to in the quotations and invoices were for office use or for making ice cream except for some furniture. The first and second plaintiffs could not claim for loss or damage to one king-size bed costing RM2,999 and one dressing table of RM999. The plaintiffs also did not explain why they required two units of television (RM500) and a massage chair (RM9,500) for their business. These items should be deducted from the sum of RM209,404.51 and the plaintiffs were entitled to only RM195,406.51. (para 45)

(9) The second plaintiff also claimed RM70,176.14 for loss of stocks and ingredients which included paper cups with lids and spoon, milk, whipping cream, sugar, matcha powder, cocoa powder, mango puree, frozen strawberries and flavourings. Notwithstanding that the trading license had expired, these items were purchased prior to the expiry of the license. Therefore, the second plaintiff was entitled to claim for the losses. These added up to RM69,207.59 and not RM70,176.14. Thus, the second plaintiff was entitled to claim RM69,207.59. (para 46)

Case(s) referred to:

Cambridge Water Co Ltd v. Eastern Counties Leather plc [1994] 1 All ER 53 ***(refd)***
Caparo Industries Plc. v. Dickman [1990] 2 AC 605 ***(refd)***
Colvilles, Ltd v. Devine [1969] 1 WLR 475 ***(refd)***
Danelle Evelyn Miller v. Maurin Ashton Miller [2011] HCA 9 ***(refd)***
Gala v. Preston [1991] 172 CLR 243 ***(refd)***

A *Henwood v. Municipal Tramways Trust (SA) [1938] 60 CLR 438* ***(refd)***
Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Company [1968] 1 LNS 72 FC ***(refd)***
MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
B *Rainham Chemicals Works, Limited (In Liquidation), and Others v. Belvedere Fish Guano Company, Limited [1921] 2 AC 465* ***(refd)***
Rylands v. Fletcher (1868) LR 3 HL 330 ***(refd)***
Smith v. Jenkins [1970] 119 CLR 397 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
C *The Wagon Mound (No 1) [1961] 1 All ER 404* ***(refd)***
The Wagon Mound (No 2) [1966] 2 All ER 710 ***(refd)***

Legislation referred to:
Businesses, Professions and Trades Licensing Ordinance (Sarawak) (Cap 33), ss. 3(1), 6(5)
D Evidence Act 1950, s. 81

For the plaintiffs - Alvin Yong & Shirleen Ong; M/s Alvin Yong Advocs
For the defendants - KC Wong; M/s KC Wong & Assocs

Reported by Sandra Gabriel

E **JUDGMENT**

Stephen Chung J:

[1] The first plaintiff was the registered owner of a building situated at Lot 980, Serian Industrial Estate, 94700 Serian, Sarawak. The first plaintiff used
F the first floor of the building as an office. The second plaintiff occupied the ground floor of the building to manufacture and supply ice cream. The third plaintiff is the son of the first plaintiff and a director of the second plaintiff. The third to fifth plaintiffs were employees of the second plaintiff who worked in the ice cream factory.

G **[2]** The first to fifth defendants were partners, trading under the name of Kim Yi Trading Company, in the business of selling agrochemicals and fertilizers which occupied an adjacent building at Lot 981 which was also used to store the agrochemicals and fertilizers. The first to third defendants were the registered owners of Lot 981.

H **[3]** On 14 March 2014 a fire and explosions occurred in Lot 981 which caused damage to Lot 980 belonging to the first plaintiff and to the business of the second plaintiff. The third, fourth and fifth plaintiffs who were working in Lot 980 sustained injuries as a result. The plaintiffs contended that the explosions were caused by the negligence of the defendants, their
I servants or agents. They have set out the particulars of negligence, including relying on the doctrine of *res ipsa loquitur*, in their statement of claim.

[4] The plaintiffs also contended that the defendants failed to ensure that the chemicals from the fertilizers and or agrochemicals would not escape from their storage which caused the explosions with consequent danger to persons and property in the vicinity of the fertilizer factory.

[5] The plaintiffs submitted that as a result of the explosions, the building and factory became severely damaged which interrupted the second plaintiff's business causing loss of profit from the business for five months from the day of the explosions. The plaintiffs claimed against the defendants jointly and severally for general damages to be assessed and for special damages as pleaded.

[6] The defendants submitted that their business was registered and they had the necessary licenses to trade, sell and store chemicals and agrochemicals products in their premise. They submitted that they were only storing agrochemical products, fertilizers, tools and products in the premise.

[7] The defendants denied that the explosions were caused by their negligence or by their servants or agents. The defendants denied that they were guilty of the alleged or any negligence as pleaded. The defendants submitted that the explosions were accidental due to the chemical reaction and or nature of the agriculture products and not due to the negligence of the defendants.

[8] In respect of damages, the defendants denied liability and contended that the second plaintiff operated the ice cream factory illegally because it did not have the relevant license, permit or approval of the relevant authorities to use the factory for the manufacturing and supply of ice cream and not entitled to the damages as claimed.

[9] During the trial, the defendants amended their statement of defence by pleading that the third to fifth plaintiffs were insured and covered by Perkeso which had paid compensations to them for their injuries and therefore not entitled to claim the damages for their personal injuries again.

[10] The plaintiffs brought this action against the defendants claiming damages in negligence and nuisance under the rule of *Rylands v. Fletcher* [1868] LR 3 HL 330. The plaintiffs and defendants did not call any expert evidence or the police or Bomba on the cause of the fire and or explosions. I have read the submissions and authorities cited by the parties.

[11] On the first issue, did the defendants owe any duty of care to the plaintiffs? Both in negligence and nuisance, the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. However, in nuisance, it is not sufficient that the injury suffered was the direct result of the nuisance if that injury was in the relevant sense unforeseeable: see *The Wagon Mound (No. 1)* [1961] 1 All ER 404; *The Wagon Mound (No. 2)* [1966] 2 All ER 710; *Ling Nam Rubber Works v. Leong Bee & Company* [1968] 1 LNS 72; [1968] 1 MLJ 216.

[12] As between the alleged wrongdoer and the person who has suffered damage, the question is whether there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a *prima facie* of care arises. In addition to the elements of foreseeability and proximity, the situation should be one in which the court considers fair, just and reasonable: see *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389.

[13] In this case, the plaintiffs and defendants occupied adjacent buildings, next to each other, namely Lot 980 and 981. They were neighbours and in close proximity with each other. Any carelessness on the part of the defendants, as in this case in which fire and explosions occurred in Lot 981, it was foreseeable that the explosions would likely cause damage to the property and the business of the plaintiffs in the adjoining Lot 980 and injuries to persons in Lot 980.

[14] The plaintiffs have referred to paras. 8 and 9 of the defence where the defendants pleaded that the explosion or inevitable explosion was caused by the nature of the agrochemical products stored in Lot 981. The plaintiffs also referred to the third defendant's witness statement where he stated that the explosion could occur due to chemical reaction and or nature of the agrochemical products stored. The plaintiffs submitted that therefore the defendants had acknowledged the dangerous nature of the products stored in their premise. It was submitted that the defendants should have taken reasonable measures to ensure a safe environment and prevent the risk of explosions.

[15] The plaintiffs asserted that the defendants failed to take all reasonable and effective measures, whether by inspection, examination or otherwise, to ensure that there was or would be no risk of explosion arising from the manufacturing, storing or handling of agrochemicals and fertilizers in the premise which were potentially explosive or inflammable and failed to take steps to prevent the explosions which caused the damages to the plaintiffs.

[16] The plaintiffs have pleaded and submitted on the maxim of *res ipsa loquitur* and the rule of *Rylands v. Fletcher*. The plaintiffs submitted that they were in no position to know what precise acts of omissions of the defendants which led to their injuries and damages suffered especially where the cause of the fire and explosions were within the knowledge of the defendants.

[17] The maxim of *res ipsa loquitur* is not a rule of law but a rule of evidence. The principal requirement for the maxim to apply is that where the thing is shown to be under the management of the defendants or their servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the

accident arose from want of care. The mere fact of the accident having happened should tell its own story and raise the inference of negligence so as to establish a *prima facie* case against the defendants: see *Colvilles, Ltd v. Devine* [1969] 1 WLR 475; *M.A. Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73; [1970] 2 MLJ 183.

[18] The rule in *Rylands v. Fletcher* can be stated as, where a defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape, even if the escape was an isolated event.

[19] Irrespective of whether the rule in *Rylands v. Fletcher* was treated as an aspect of nuisance or as a special rule pertaining to strict liability for damage caused by ultra-hazardous operations on land because of the extraordinary risk to others resulting from such operations, foreseeability of damage of the relevant type if there was an escape from the land of things likely to do mischief was a prerequisite of liability. Accordingly, strict liability for the escape from land of things likely to do mischief only arose if the defendant knew or ought reasonably to have foreseen that those things might if they escaped cause damage. Strict liability applied where there was an escape occurring in the course of the non-natural use of land notwithstanding that he had exercised all due care to prevent the escape from occurring. The storage of substantial quantities of chemicals on industrial premises is an almost classic case of non-natural use even in an industrial complex: *Cambridge Water Co Ltd v. Eastern Counties Leather plc* [1994] 1 All ER 53. See also *Rainham Chemicals Works, Limited (In Liquidation), and Others v. Belvedere Fish Guano Company, Limited* [1921] 2 AC 465.

[20] The first defendant denied that the defendants were negligent and that the explosion was not caused by the negligence of the defendants or their servants or agents. He said they had been storing agrochemical products and fertilizers in the premise in compliance with all the regulations and standard of procedure in the storage and no accident or explosion had ever occurred since 1999. He denied that they failed to ensure the chemicals from the agrochemicals and fertilizers had not escaped from their storage causing the explosion. He said the cause of the explosion was unknown and the police was still investigating the cause of the explosion.

[21] The third defendant gave similar testimony. However, he said the explosion could occur due to the chemical reaction and or nature of the agriculture products notwithstanding the exercise of all reasonable care and skill on the part of the defendants and they were unable to avoid the same. DW2, DW3 and DW5 were in no position to explain the cause of the explosions.

[22] Based on their pleadings of the inevitable explosion due to the agrochemical nature of the products stored and on their witness statements that the explosion could occur due to the chemical reaction and or nature of the agriculture products stored in their premise, they knew or were aware of the risk of an explosion. The risk was foreseeable.

[23] Although the first and third defendants contended that they exercised all reasonable care and skill, they did not explain what steps or actions were taken to prevent the chemical reaction or nature of the agrochemicals and fertilizers stored or what steps were taken to manage or reduce the risk of explosion which was foreseeable.

[24] In their witness statements, they did not refer to a police report lodged by the first defendant after the explosions. In the police report, the first defendant said that after he completed loading goods onto a lorry, he went to wash his hands at a washing basin placed in the middle of the premise. He said he suddenly saw a welder trying to put out a fire by using water and fire extinguisher but the first explosion occurred. He shouted for people to get out and he ran out. He said he did not know the cause of the fire which led to the explosions.

[25] Since the welder was present and trying to put out a fire in the premise, it was probable that welding was carried out in the premise. Based on the police report lodged by the first defendant, the defendants did not deny the fire and which led to the explosions. During the trial, parties have referred to newspaper reports on the fire and explosions (see exh. P20). The newspapers' reports confirmed the fire and explosions which were believed to be set-off by acetylene gas used during wiring works in the premise and that the hazardous materials team (Hazmat) detected trace amounts of hydrogen sulfide gas prompting police to cordon the area. The reports also stated that the explosions damaged five other buildings and vehicles in the vicinity and that 19 persons sustained injuries including two ice cream factory workers who suffered internal injuries who were taken to the Sarawak General Hospital (SGH).

[26] Although the reporters were not called to testify, the court shall presume the genuineness of a newspaper report: see s. 81 of the Evidence Act. The defendants did not seriously challenge the contents of the newspaper reports and did not adduce any evidence to the contrary or that the newspapers' reports were fabricated or false.

[27] The defendants did not say that they did not know of the presence of the welder or that they did not authorise the welding to be carried out in their premise. They did not say that the welder was not their servant or agent. Assuming the welder was not their servant or agent, his presence and welding being carried out in their premise could only be with their knowledge or consent. The defendants did not call the welder to explain what happened or that it was not the fault of the defendants.

[28] Clearly with welding carried out in the premise which was used to store agrochemicals and fertilizers of a volatile and inflammable nature, the defendants knew and had assumed the risk of a fire and an explosion in their premise. Again, they did not explain the steps taken to prevent or reduce the risk of the fire and explosion in the premise which was used to store the agrochemicals and fertilizers especially when welding was being carried out. In failing to do so, that tantamount to negligence on their part.

[29] Based on the police report lodged by the first defendant and the evidence adduced, on that date, there was a fire and violent explosions in the defendants' building described as Lot 981 which was in the possession and occupied by the defendants which was used to store agrochemicals and fertilizers for the defendants' business. Lot 980, the building of the first plaintiff which was used by the second plaintiff to manufacture and supply ice cream, was adjacent to Lot 981. The third, fourth and fifth plaintiffs were working in Lot 980 at the material times. The two buildings were in close proximity to each other and there was sufficient proximity between the plaintiffs and the defendants. These gave rise to a duty of care by the defendants to the plaintiffs.

[30] The facts showed that as a result of the explosions, the first plaintiff's building was badly damaged, the machines, equipment and chattels stored in the building or used in the manufacture and supply of ice cream were damaged, the business of the second plaintiff was interrupted and affected and the third, fourth and fifth plaintiffs sustained injuries.

[31] Based on the facts and circumstances of the case, on a balance of probabilities, the plaintiffs have proved negligence on the part of the defendants. The plaintiffs have also proved that the rule in *Rylands v. Flectcher* was applicable to the facts of this case. The plaintiffs have proved causation and that they had sustained losses and damages as a result.

[32] In respect of damages, a plaintiff seeking substantial damages has the burden of proving both the fact and the quantum of damages before he can recover: *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15.

[33] The first plaintiff was the registered owner of Lot 980. He said he used the first floor as his office and the ground floor by the second plaintiff to manufacture and supply ice cream. He said the defendants used Lot 981 which was an adjoining building to store agrochemicals and fertilizers. He said on 14 March 2014 an explosion occurred in Lot 981 which caused his premise to be destroyed. He asked PW5 to give a quotation for the repair and reconstruction of his premise. He said the total reconstruction costs amounted to RM461,306.

[34] PW5, a partner of Billion Miles Engineering (M), testified that the first plaintiff asked his firm to give a quotation to reconstruct Lot 980 which was a double-storey industrial building. He went with his firm's project director Wong Kiing Lee to inspect Lot 980 which was damaged and they were of the opinion that the premises was a high-risk building unfit for occupation and it was necessary to reconstruct the whole building. He said parts of the concrete floor and tiles were cracking and damaged, the brick walls falling apart with fire burn marks and cracking, the ground beams were affected by the explosion with the inner bit of the RC steel exposed and the roof and ceiling had collapsed. He said the ground beams need to be knocked off and to reconstruct the ground beams and the RC slabs and the roofing needed to be reconstructed together with the electrical works. PW5 testified that based on the inspection it would cost RM461,306 to reconstruct the building.

[35] The defendants submitted that other than the quotation, there was no report regarding the structure of the building. It was submitted that there was no structural engineering test or survey carried out to support the first plaintiff's claim that the ground beam had been damaged which necessitated the reconstruction of the building. The defendants submitted that based on a quotation prepared by one Henry Chan of Makmur Construction and Beautification, the estimated costs of repairs to the building amounted to RM247,082 only. It was submitted that the first plaintiff was taking advantage of the situation to scale up the costs of restoring the building to its original condition prior to the explosions and that the costs of RM461,306 were excessive and could not be correct.

[36] The defendants did not call Henry Chan as a witness or to tender his quotation. There was no evidence of his qualifications and experience and whether he inspected the building in preparing the quotation. There was no evidence adduced to rebut or dispute what PW5 had testified on the damage to the building and the costs of reconstruction. PW5 has an engineering degree, a Master in Engineering Management and a certified Project Management Professional. Based on his qualifications and experience, on the evidence adduced, and there was no evidence to the contrary, there was no reason not to accept his evidence on the costs to reconstruct the building.

[37] In respect of the first and second plaintiffs' claims for loss and damage to furniture, hardware tools and spare parts kept at Lot 980, the first plaintiff was asked and said that he was a plantation and transportation contractor and used the first floor as his office. After the explosion, he went to a spare-parts shop to check the price of the items which were damaged or lost. He referred to photographs (exh. P28) taken of the damage to the items. He produced three quotations (exh. P13(A-C) amounting to RM136,369. Similarly, the third plaintiff had referred to photographs and invoices for the fixtures, machineries and furniture used for the manufacture of ice cream in the premise.

[38] The defendants submitted that the first plaintiff did not produce any license in his business as a plantation and transportation contractor. It was submitted that although the first plaintiff took photographs of the damage of his premise, the first plaintiff did not have photographs of the alleged tools or spare parts which he claimed he lost and he did not get an adjuster or surveyor to prepare a report to substantiate his loss.

[39] The defendants submitted that the second plaintiff's business of manufacturing ice cream in the premise was illegal because it did not have a valid trading license at the time of the explosions and therefore not entitled to claim the losses and damages incurred. Based on a license tendered as exh. P41, the second plaintiff had a valid trading license from 18 January 2013 to 17 January 2014. At the time of the fire and explosions, the trading license had expired.

[40] Section 3(1) of the Businesses, Professions and Trades Licensing Ordinance (Sarawak Cap.33) states that any person who carries on in Sarawak any business in respect of which a trading license is not for the time being in force, shall be guilty of an offence. Section 6(5) states that in any case in which an offence against s. 3 has been committed by reason of the fact that a license has ceased to be in force by virtue of this section, the Collector may, with the consent of the ex-licensee, compound the offence by accepting a payment not exceeding one hundred ringgit. There was no evidence that the second plaintiff had agreed to compound the offence or had renewed the license.

[41] There is no general rule of law that a plaintiff, acting contrary to law, when he suffered damage of which the defendant's negligence is alleged to be a cause, does not automatically preclude him from recovering damages from the defendant. There is no a *priori* reason why the illegality of a particular enterprise or activity should automatically negate the existence of a duty of care which might otherwise arise from the relationship which subsists between the parties, especially in *Smith v. Jenkins* [1970] 119 CLR 397 has rejected the public policy approach. In *Henwood v. Municipal Tramways Trust (S.A)* [1938] 60 CLR 438, the conduct of the passenger putting his head out of the windows of the tram in breach of a safety by-law which exposed him to liability for a penalty under the by-law did not preclude him from claiming negligence against the tramway authority. The by-law was to ensure the safety of passengers. In that case, the court rejected the defence of illegality: see *Gala v. Preston* [1991] 172 CLR 243; *Danelle Evelyn Miller v. Maurin Ashton Miller* [2011] HCA 9.

[42] Similarly, in this case, the second plaintiff in failing to renew the business license was in breach of a licensing law which subject the second plaintiff to a penalty of RM100. This licensing Ordinance is concerned with the collection of revenue. It does not preclude the second plaintiff from recovering damages sustained due to the negligence of the defendants.

[43] In respect of the loss of profit, based on the audited account of the second plaintiff, for the year from 29 November 2012 to 31 December 2013, the second plaintiff incurred a loss from operations. Similarly, for the year from 1 January 2014 to 31 December 2014, the second plaintiff also incurred a loss. Therefore, the second plaintiff did not make any profit and not entitled to claim for loss of profits against the defendants.

[44] Referring to the statement of claim, the first and second plaintiffs in the statement of claim did not separately list their fixtures, machines, furniture or spare-parts owned by them which were damaged. Instead, they claimed total loss for fixtures, machineries and furniture in the factory in one lump sum of RM258,428.14. Based on the three quotations amounting to RM136,369 and the invoices and submissions made on the value of the items claimed by the second plaintiff which amounted to RM73,035.51 (see pp. 22 to 26 of plaintiffs' submission), these two sums aggregated to RM209,404.51 only. Therefore the claim for RM258,428.14 could not be correct.

[45] Based on the title conditions, the ground floor was for industrial use and the first floor for office. Lot 980 could not be used for residential purpose. The items referred to in the quotations and invoices were for office use or for making ice cream except for some furniture. The first and second plaintiffs could not claim for loss or damage to one king-size bed costing RM2,999 and one dressing table of RM999. The plaintiffs also did not explain why they required two units of television (RM500) and a massage chair (RM9,500) for their business. These items should be deducted from the sum of RM209,404.51. Under item 2 of para. 8 of the statement of claim, on evidence adduced, the first and second plaintiffs were entitled to RM195,406.51.

[46] The second plaintiff also claimed RM70,176.14 for loss of stocks and ingredients which included paper cups with lids and spoon, milk, whipping cream, sugar, matcha powder, cocoa powder, mango puree, frozen strawberries and flavourings. Notwithstanding that the trading license had expired on 17 January 2014, based on documents referred to (exh. 34 (1-5), dated 22 June 2013, 11 November 2013 and 13 January 2014, which were purchased prior to the expiry of the license, the second plaintiff was entitled to claim for the losses. These added up to RM69,207.59 and not RM70,176.14. The second plaintiff was entitled to claim RM69,207.59 for stocks and ingredients which were lost due to the explosions which were purchased prior to 17 January 2014.

[47] In respect of the claim for RM3,133.33 for marketing costs, the second plaintiff rented a space in a shopping mall to promote and sell its ice cream from 1 to 31 March 2014 for a rental of RM1,600 (see p. 86 of BOD1). The second plaintiff claimed RM533.33 only because it could not sell ice cream as it ran out of stock due to the explosions. The second plaintiff incurred RM2,600 for an advertisement in a publication 'Borneo Talk' (see p. 85 of BOD1).

[48] In respect of the claim for RM36,500 for five months' salary for employees, the defendants contended that based on the monthly submissions to EPF for the months of October, November and December 2013, the average monthly EPF contribution was RM1,828 whereas the average monthly contribution for the first three months for 2014 was only RM1,806. The defendants submitted that these contradicted the monthly salary claims of RM7,300 for its five employees.

[49] The above submission was based on the last three months of 2013 and first three months of 2014. The parties did not produce any EPF contribution for the subsequent months. The second plaintiff contended that it had to continue to pay the salaries of its employees although it was unable to operate its business for five months due to the explosions.

[50] Based on the documents referred to, the fourth and fifth plaintiffs were each paid RM900 per month for the months of March, April, May, June and July of 2014 (see exh. 2 (A-E) at pp. 69, 73, 77, 81 and 85 of BOD2 and exh. P3(A-E) at pp. 72, 76, 80, 84 and 88 of BOD2). The third plaintiff and Ang Yik Ching (PW4), being directors, were paid RM3,000 and RM2,500 respectively per month for the months of March, April, May, June and July, 2014 (see pp. 70, 71, 74, 75, 78, 79, 82, 83, 86 and 87 of BOD2). There was no evidence to the contrary. There was nothing to suggest that these documents were fabricated. On a balance of probabilities, the second plaintiff was entitled to claim the sum of RM36,500.

[51] In respect of injuries sustained by the third, fourth and fifth plaintiffs, the defendants contended that the third to fifth plaintiffs were insured and covered by Perkeso which had paid compensation to them for their injuries. It was submitted that they were not entitled to claim the damages for their personal injuries again. The burden was on the defendants to prove this. The first and third defendants in their witness statements merely denied the claims of the third to fifth plaintiffs and verily believed that their injuries would be covered by Perkeso. In his supplementary witness statement, the first defendant stated that as the salaries and injuries had been covered by Perkeso which they have made a claim and being paid by Perkeso. However the defendants did not produce any documents to establish that Perkeso had paid the third, fourth and fifth plaintiffs for their injuries sustained. The defendants did not call a witness from Perkeso to establish this which they have pleaded. There was no evidence that they have been paid for their injuries by Perkeso: see *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398.

[52] The fourth plaintiff testified that on 14 March 2014, at around 3pm, he was working in the ice cream factory namely Lot 980. Suddenly, he heard an explosion, then a second explosion and he was hit by something. He said he lost consciousness for a while. When he woke up, he saw the door frame and door pressing against the lower part of his body and he was pinned to

A the wall in a standing position. He said he struggled to crawl out from his position and sat down on a damaged table which was next to him at that time. He could feel his right leg was weak, painful and could not walk. He said he saw his colleague Liu Boon Cheng (the fifth plaintiff) lying on the floor unconscious.

B **[53]** He saw a Bomba personnel and he called for help. A group came and carried the fifth plaintiff and a Liew Yen Nee out of the premises. He was the last to be carried out and was brought to the Emergency Ward in Serian Hospital and was examined using ultrasound scan. He said the doctor informed him that his kidney was bleeding and he had to be transferred to C SGH. He was discharged ten days after admission to SGH. The plaintiffs have subpoenaed four medical doctors who testified on the injuries sustained and the treatments given to the third to fifth plaintiffs.

[54] Based on his medical report, the fourth plaintiff suffered post-traumatic grade V right renal injury, large right retroperitoneal hematoma, D grade 1 liver injury, multiple abrasion wounds on the inner and lower limb and right knee injury and claimed general damages. He has established his claim on a balance of probabilities for hospital bills of RM170 and loss of personal effects of RM1,450 (see pp. 19 to 27 of BOD1).

E **[55]** The fourth plaintiff submitted that he was entitled to RM72,000 as general damages for his injuries sustained based on several authorities cited for damages awarded for such injuries (see pp. 44-45 of submission). Counsel for the defendants did not cite any authorities to the contrary or that the quantum was excessive or wrong.

F **[56]** The third and fifth plaintiffs gave similar evidence about the explosions and the injuries they sustained. After the explosions, the third plaintiff was admitted to Serian Hospital for the wounds sustained to his shoulder, chest, right hand and fourth finger and they were cleaned and stitched by a doctor. The third plaintiff said he continued to experience pain to his lower back and consulted a doctor at Borneo Medical Centre. Based G on the x-ray and MRI, he found out that he sustained bilateral L4 pars interarticularis fracture, annular tear at L4/5 level causing mild disc prolapsed and subtle grade 1 anterolisthesis of L4/L5. The third plaintiff has referred to the x-ray and MRI at pp. 15-16 of BOD1 and to the receipts from Borneo Medical Centre (exh. P42).

H **[57]** He claimed general damages and special damages for hospital bills of RM1,278.60 and loss of personal items of RM4,568.30 (see pp. 15 to 18 of BOD1). The third plaintiff claimed a sum of RM66,000 as general damages based on authorities cited for awards given for similar injuries. Again, the defendants did not cite any authorities to the contrary or that the awards were I excessive or wrong based on the facts and injuries in this case.

[58] In respect of the loss of personal items, these items were an auto watch Ingersoll which cost RM1,040, an Esprit shirt RM145, a pair of Levis trousers RM264 (exh. P43(1)) and a pair of Timberland shoes RM349.30 (exh. P43(2)). The third plaintiff was entitled to claim these losses. The third plaintiff could not produce the damaged Samsung Galaxy Note 3 or a photograph of it or any invoice or receipt to establish that he owned and had sustained the loss in respect of the Samsung Galaxy Note 3 of RM2,150.

[59] The fifth plaintiff sustained right lung contusion, right abdominal hematoma, grade IV liver injury with active bleeding, loss of consciousness, blurring of vision of left eye and multiple abrasions, lacerations and bruises of the body and forearms and claimed general damages. He was in ICU for four days.

[60] He also claimed RM573.80 for hospital bills and RM250 for loss of personal effects (see pp. 27 to 32 of BOD1). The fifth plaintiff claimed a sum of RM68,500 as general damages based on authorities cited for awards given for similar injuries (see pp. 50-51 of submission). There was no evidence to the contrary. The fifth plaintiff was entitled to claim for the losses sustained.

[61] Further, the first to the fifth plaintiffs were entitled to interest on the damages awarded at 4% per annum from the date of the explosions on 14 March 2014 until full settlement.

[62] In respect of costs, I have considered the pleadings, the issues raised, the bundles of documents filed, the number of witnesses called, the lengthy cross-examinations of the plaintiffs' witnesses and the length of the trial, the defendants shall pay costs of RM50,000 to the plaintiffs jointly and to pay the allocatur.